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No. 87-1891

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

DRUID HILLS CIVIC ASSOCIATION, INC., ET AL., PETITIONERS

v.

THE FEDERAL HIGHWAY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court, after remanding a case to the Secretary of Transportation for further findings, retained jurisdiction to review the Secretary's decision on remand.

2. Whether the district court abused its discretion in denying petitioners' motion to dismiss their lawsuit voluntarily under Fed. R. Civ. P. 41(a)(2).

3. Whether the district court abused its discretion in denying petitioners discovery to supplement an administrative record.

4. Whether petitioners were prevailing parties entitled to an award of attorneys' fees because they obtained a remand to the agency for further findings, even though they ultimately failed to persuade the agency or the court to reverse the agency's original decision on the merits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 833 F.2d 1545. The opinion of the district court (Pet. App. A13-A31) is reported at 650 F. Supp. 1368.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1987. A petition for rehearing was denied on February 19, 1988 (Pet. App. A82-A83). The petition for a writ of certiorari was filed on May 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 21, 1984, the Secretary of Transportation (the Secretary), through the Federal Highway Administration, authorized the use of federal funds for the construction of the Presidential Parkway in Atlanta, Georgia. The Parkway was to run between downtown Atlanta and a section of the city known as Druid Hills. The Secretary prepared an environmental impact statement pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.* Further, because the road was to be built through both park lands and an historic area, the Secretary analyzed alternative routes as required under Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 (recodification of former 49 U.S.C. 1653(f)). The Secretary concluded that there was "no feasible and prudent alternative to the use of such land" and that the proposal included "all possible planning to minimize harm" to historic and park lands.

2. Two separate lawsuits, subsequently consolidated, were filed against the Federal Highway Administration challenging the project. The district court, declining to enjoin construction of the Presidential Parkway, held (Pet. App. A78) that the Secretary's decision was not arbitrary, capricious, or an abuse of discretion. The court of appeals affirmed in part and reversed in part (*id.* at A32-A55). The court affirmed the district court's holdings with regard to compliance with NEPA and with Section 4(f)(1) of the Department of Transportation Act of 1966. The court of appeals held, however, that the Secretary had not made "the requisite findings necessary for an informed comparison of the relative harms anticipated by the construction of the various routes" (Pet. App. A51) as required under Section 4(f)(2), which imposes a duty on the Secretary "to utilize a balancing process that totals the

harm caused by each alternative so that an option can be selected which does the least harm" (Pet. App. A50). The court of appeals determined that "the case must be remanded to the Secretary for adequate findings of the impact on 4(f) properties" (*id.* at A54), and remanded to the district court for proceedings consistent with the court's opinion (*id.* at A55).

3. The Secretary, after conducting further studies, found that the original route chosen, when measured against alternative routes, produced the least harm to park and historic lands. After a new Section 4(f) statement was issued, the Secretary moved for summary judgment. Petitioners opposed the granting of summary judgment on the ground that the district court was without jurisdiction after remand. Petitioners also moved the district court for voluntary dismissal of the case and, should the court deny that motion, asked the court to certify the question for an immediate appeal. Petitioners also moved for an award of attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A).

The district court granted the government's motion for summary judgment, holding that the Secretary had acted within the scope of her authority (Pet. App. A21-A23); that all relevant factors had been considered in the decision to use the original route selected rather than another alternative using Section 4(f) lands (Pet. App. A23-A26); and that the Secretary had complied with all procedural requirements (*id.* at A27-A28).

In addressing petitioners' motion for voluntary dismissal or, alternatively, certification of the question for immediate appeal, the district court observed that dismissal at that stage of the proceedings would prejudice the defendants (Pet. App. A17). The district court also held that the controlling precedent of its circuit supported the view that

it had retained jurisdiction since the remand to the agency had not been a final judgment (*id.* at A15-A18).

The district court denied petitioners' motion for additional discovery (Pet. App. A18-A19), stating that discovery would not aid the parties in determining the adequacy of the administrative record to support the Secretary's new findings.

In denying petitioners' fee application, the district court found that petitioners "did not achieve significant success on any of the issues or obtain any of the relief they sought," citing *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (Pet. App. A30).

4. The court of appeals affirmed, rejecting petitioners' argument that the district court's entry of judgment after the first appeal "constituted a final judgment under the separate document rule of Federal Rule of Civil Procedure 58" (Pet. App. A7). Citing its earlier decision in *Taylor* v. *Heckler*, 778 F.2d 674 (11th Cir. 1985), the court of appeals held that the remand order had not divested the district court of jurisdiction (Pet. App. A6).

The court of appeals also affirmed the district court's denial of petitioners' motion for voluntary dismissal of the complaint since the Secretary would have been deprived of the opportunity for further proceedings that the remand order had conferred on both parties (Pet. App. A10). Having submitted themselves to the authority of the federal court system, petitioners could not, the court of appeals held, unilaterally withdraw from a lawsuit at a particular procedural stage in the litigation on the ground that petitioners were now satisfied with the result (*id.* at A8).

The court of appeals also rejected petitioners' assertion that the district court had abused its discretion in denying their motion for further discovery in order to oppose the

Secretary's summary judgment motion (Pet. App. A10-A11). The court of appeals noted that petitioners had failed to take opportunities available to them either to file a brief responding substantively to the Secretary's motion or to conduct extensive discovery at the time the suit had been filed (*id.* at A11).

Finally, in affirming the district court's denial of petitioners' application for attorneys' fees, the court of appeals held that petitioners had "not ultimately achieved the primary relief sought" (Pet. App. A12).

ARGUMENT

1. Petitioners first contend (Pet. 6-11) that their lawsuit terminated and the district court lost jurisdiction when the case was remanded to the Secretary for further findings in 1985. Thus, they argue that the district court could not address the adequacy of the Secretary's findings on remand unless some adversary party brought a new lawsuit to challenge those findings. Petitioners' argument, although couched in constitutional "case or controversy" terms, rests at bottom on a misunderstanding of the prior mandate of the court of appeals and judgment of the district court.

It was petitioners, not respondents, who invoked the jurisdiction of the district court in the first place. Once a live controversy was placed before the court, it retained jurisdiction until it entered a dispositive order. Although petitioners have contended that the district court's judgment remanding the case to the Secretary was such a dispositive order, the settled law in the Eleventh Circuit is to the contrary (*Taylor* v. *Heckler*, 778 F.2d at 677 n.2, quoted at Pet. App. A6):

> Because this circuit considers a remand order an interlocutory order, it follows by operation of law that

> the district court retains jurisdiction of the case until the proceedings on remand have been concluded. To terminate its jurisdiction, the district court must subsequently enter a dispositive order of some sort * * *.

Thus, it simply is not the case that the lawsuit initiated by petitioners terminated in 1985, nor did the findings of the Secretary on remand amount to a new administrative decision that could only be challenged in a new lawsuit. Rather, the Secretary made those findings pursuant to an interlocutory order that, by operation of law, preserved the district court's jurisdiction to act in response to the Secretary's action.[1]

The principle that there must be an actual case or controversy, in the constitutional sense, at all stages of the proceedings (see Pet. 10, citing *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974)) does not support petitioners' contention that the district court lost its jurisdiction once petitioners elected to give up on any further substantive challenge to the Secretary's decision. The principle that petitioners invoke precludes courts from exercising jurisdiction over

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[1] The Eleventh Circuit rule that the district court retains jurisdiction when it remands a case to an administrative agency, and that the remand order is therefore interlocutory rather than final, accords with numerous decisions of other courts of appeals holding such remand orders to be interlocutory rather than final for purposes of determining appealability. See, *e.g.*, *Mall Properties, Inc.* v. *Marsh*, 841 F.2d 440, 441 (1st Cir. 1988) ("The litigation has not ended. It simply has gone to another forum and may well return again."); *Cabot Corp.* v. *United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986); *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 404 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); *McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc); *United Steelworkers, Local 1913* v. *Union R.R.*, 648 F.2d 905, 909 (3d Cir. 1981); *Fayetteville Area Chamber of Commerce* v. *Volpe*, 463 F.2d 402, 405-406 (4th Cir. 1972).

cases such as *DeFunis* that have become moot because the plaintiff will neither benefit from a favorable determination of the legal issues nor suffer from an unfavorable determination. See also, *e.g.*, *Honig* v. *Doe*, No. 86-728 (Jan. 20, 1988), slip op. 10-11. It does not extend to cases such as this one in which the plaintiff, although it will be injured just as much by the defendant's actions as it would have been at the start of the lawsuit, merely decides that it no longer wishes to have a judgment entered in the lawsuit. If the *DeFunis* principle extended that far, then courts would be powerless ever to deny motions for voluntary dismissal, and Fed. R. Civ. P. 41(a)(2), conditioning the grant of such motions on leave of court, would be meaningless.

Because the district court retained jurisdiction when it remanded this case to the Secretary, it was entirely proper for respondents to move for summary judgment following the Secretary's decision on remand, and the district court correctly treated that motion as a proper pleading in a pending case. Respondents' determination not to pursue the case further did not deprive the court of jurisdiction to conclude the lawsuit by entering a final judgment.

2. Petitioners next contend (Pet. 11-14) that the district court should have granted their motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2). Petitioners' claim that they had a right to voluntary dismissal, however, seriously misconceives the nature of Rule 41(a)(2). Rule 41(a)(2) is written in prohibitory terms: "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Contrary to petitioners' position (Pet. 12) that "[t]he district court is not empowered to simply weigh 'the equities' in deciding a motion to dismiss under Rule 41(a)(2)," it is hornbook law (5 J. Moore, J.

Lucas, & J. Wicker, *Moore's Federal Practice* ¶ 41.05[1], at 41-47 to 41-50 (2d ed. 1987) (footnotes omitted)) that

> [u]nder Rule 41(a)(2) the court has the power to weigh the equities and do justice in each case. After plaintiff has lost his power to effect a voluntary dismissal under Rule 41(a)(1), dismissal at his instance may only be had under Rule 41(a)(2) upon order of the court, and upon such terms as the court deems proper. The granting of the motion is within the court's discretion, and not a matter of right; and therefore the trial court's ruling will not be overturned on appeal absent a showing of an abuse of discretion.

In light of the broad discretion granted trial courts by Rule 41(a)(2), it has been held sufficient to support the denial of a motion for voluntary dismissal that "the motion was made after defendant had moved for summary judgment and in order * * * merely to avoid summary judgment" (5 J. Moore, J. Lucas, & J. Wicker, *supra,* at 41-54 to 41-55 (footnote omitted)) or "the motion was made after the case was ready for final disposition by summary judgment" (*id.* at 41-56 (footnote omitted)). Recently, in *Paulucci* v. *City of Duluth,* 826 F.2d 780 (8th Cir. 1987), the court of appeals listed factors that a district court could properly consider in denying a motion for voluntary dismissal, including three factors that were present here: the filing of a motion for summary judgment by the defendant; time and expense involved in preparing for trial proceedings; and "the absence of a justification for the proposed dismissal" (*id.* at 783).

Petitioners can show no abuse of discretion in the denial of their motion in this case. Respondents had gone to great effort to make the case ready for final disposition by the trial court, and it would have been "plain legal prejudice" (Pet. App. A10) to respondents at the time of respondents'

motion to deny them a judicial resolution of the allegation that their decision to approve the Presidential Parkway was not in compliance with Section 4(f) of the Department of Transportation Act of 1966. Moreover, it is not clear what equities petitioners can assert in favor of a grant of their motion for voluntary dismissal: unless petitioners plan to bring a second challenge under Section 4(f) to the decision to approve the Parkway—an intention that they disclaim (Pet. 8, 9, 10)—it makes no difference that the district court decided the merits of their challenge (and thus dismissed with prejudice) rather than dismissing without prejudice, and petitioners thus appear to be in the same position they would have occupied if their motion had been granted. As the district court said (Pet. App. A17): "This case has been in litigation for more than two years. The defendants have spent a great deal of time and money in preparing the new findings. Accordingly, the equities in this case fall in favor of denying plaintiffs' motion for voluntary dismissal."

The cases that petitioners cite are not remotely in conflict with the decision below. Most of the cases simply hold that district courts did not abuse their discretion in particular circumstances by granting particular motions for voluntary dismissal. See *Hamilton* v. *Firestone Tire & Rubber Co.*, 679 F.2d 143 (9th Cir. 1982); *Puerto Rico Maritime Shipping Auth.* v. *Leith*, 668 F.2d 46 (1st Cir. 1981); *Hoffman* v. *Alside, Inc.*, 596 F.2d 822 (8th Cir. 1979). To say that a grant of the motion was within the bounds of the district court's discretion is not to say that a denial would have exceeded the bounds of discretion, even on the same facts. In any event, the facts of those cases are entirely dissimilar to the facts here. And in *Davis* v. *USX Corp.*, 819 F.2d 1270 (4th Cir. 1987), although the court did reverse the denial of a motion for voluntary dismissal,

it did so not on any grounds applicable here but rather on the ground that the condition that the district court placed on voluntary dismissal resulted from a misunderstanding of the prior decision of the court of appeals in the same case. There simply is no decision that conflicts with the holding below that the district court acted within the limits of its discretion by denying voluntary dismissal in the circumstances of this case.[2]

3. Petitioners also assert (Pet. 14-17) that the district court abused its discretion by denying petitioners an opportunity for discovery after the post-remand findings of the Federal Highway Administration and further denying them an opportunity to respond to the federal defendants' motion for summary judgment. The district court, however, determined (Pet. App. A18-A19) that additional discovery would not have assisted the court and the parties in addressing the question whether the administrative record was adequate to support the findings made by the federal defendants. The district court noted (*id.* at A19 n.1) that, although petitioners had filed a response to the government's motion for summary judgment, the pleading "did not respond substantively to the merits of the motion" (*id.* at A11). The district court granted petitioners additional time to file a brief addressing the merits of the government's motion, but petitioners did not take advantage of the grant of additional time (*ibid.*):

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[2] Petitioners cite several decisions of the former Fifth Circuit (Pet. 12-13) in an effort to support their argument, but none of those cases resembles this one. We do not elaborate on the distinctions because under *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), those decisions are binding precedent in the Eleventh Circuit, and petitioners' claim of conflict thus amounts to nothing more than a claim of intracircuit conflict, which would be for the Eleventh Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

> [Petitioners'] apparent reluctance to make any serious substantive challenge to the motion, combined with the fact that it had the opportunity to conduct extensive discovery at the time of its original challenge to the approval of the Presidential Parkway, support the district court's determination that further discovery would not lead to the creation of a material question of fact. Therefore, the district court did not abuse its discretion in denying [petitioners'] motion for additional discovery.

4. Petitioners finally assert (Pet. 17-21) that the district court erred in denying their application for attorneys' fees on the ground that petitioners were not prevailing parties. As the district court observed (Pet. App. A29), however, the sole relief that petitioners obtained was "delaying progress on the Parkway pending the defendants' new 4(f) findings." This stands in contrast to the relief sought in the complaint: enjoining the defendants from constructing the Parkway and setting aside the approval of the project (*ibid.*). Thus, as the court of appeals stated (*id.* at A11-A12), "[w]e read Druid Hills' complaint as seeking to prevent the construction of the Presidential Parkway. * * * Since we have not overturned the district court's granting of FHWA's motion for summary judgment, Druid Hills has not ultimately achieved the primary relief sought and is therefore not entitled to attorney's fees."

The decision below is in accord with the rule, widely accepted in the courts of appeals, that a plaintiff is not a prevailing party merely because it persuades a court to remand a matter to an administrative agency; rather, it is only at the conclusion of the litigation, including any decision by the agency on remand and any further judicial review, that it can be determined whether the plaintiff

succeeded in achieving the end it sought through litigation. As the Third Circuit stated in the leading case of *Brown* v. *Secretary of Health & Human Services,* 747 F.2d 878, 883 (1984):

> When a court vacates an administrative decision and remands the matter for reconsideration, the successful party generally should not recover attorney's fees at that particular time since the claimant's rights and liabilities and those of the government have not yet been determined.

Accord *Singleton* v. *Bowen,* 841 F.2d 710, 711-712 (7th Cir. 1988); *Paulson* v. *Bowen,* 836 F.2d 1249, 1252 (9th Cir. 1988); *Swedberg* v. *Bowen,* 804 F.2d 432, 434 (8th Cir. 1986); *Swenson* v. *Heckler,* 801 F.2d 1079, 1080 (9th Cir. 1984); *Cook* v. *Heckler,* 751 F.2d 240, 241 (8th Cir. 1984); *Austin* v. *Department of Commerce,* 742 F.2d 1417, 1420-1421 (Fed. Cir. 1984); *McGill* v. *Secretary of Health & Human Services,* 712 F.2d 28, 30-32 (2d Cir. 1983), cert. denied, 465 U.S. 1068 (1984); see also *Escobar Ruiz* v. *INS,* 787 F.2d 1294 (9th Cir. 1986); *NLRB* v. *Doral Building Services, Inc.,* 680 F.2d 647 (9th Cir. 1982).

The D.C. Circuit recently followed the *Brown* principle in *National Coalition Against the Misuse of Pesticides* v. *Thomas,* 828 F.2d 42 (1987). In that case, the petitioner had succeeded in persuading the court to reject as arbitrary and capricious an Environmental Protection Agency (EPA) decision to fix a certain pesticide tolerance, but EPA had adhered to its original decision after further proceedings, and a renewed challenge to EPA's decision had been unsuccessful. The court denied attorneys' fees, observing that, "[s]ince petitioners failed to achieve what they set out to accomplish, it would severely strain the language of the statute to describe them as 'prevailing' "

(828 F.2d at 44). In response to the petitioners' argument that they were prevailing parties at least in part because of their successful challenge to the original decision, the court responded that "[i]t is well settled that procedural victories of this sort, including those in which the fees claimants obtain a favorable declaration of the law, do not suffice to qualify claimants as 'prevailing parties' " (*ibid.*). As the D.C. Circuit noted, that rule, in addition to being established by prior cases in the courts of appeals, is supported by this Court's recent decision in *Hewitt* v. *Helms,* No. 85-1630 (June 19, 1987). Here, as in *Hewitt* v. *Helms,* a remand was ordered at the behest of the plaintiff (in that case to the district court rather than to an agency), but ultimately the plaintiff failed to secure the redress sought "*which [would affect] the behavior of the defendant towards the plaintiff*" (*Hewitt* v. *Helms,* slip op. 5 (emphasis in original)). See also *Hanrahan* v. *Hampton,* 446 U.S. 754 (1980).

The cases on which petitioners rely do not stand for a contrary principle. In *Citizens Council* v. *Brinegar,* 741 F.2d 584 (3d Cir. 1984), the government simply neglected to raise the question whether the plaintiffs were prevailing parties. The case contains no discussion of the factors that bear on a determination of prevailing-party status, and it does not stand as a precedent on that question, particularly in light of the same court's later decision in *Brown.* In *Sierra Club* v. *United States Army Corps of Engineers,* 776 F.2d 383 (2d Cir. 1985), cert. denied, 475 U.S. 1084 (1986), the plaintiffs achieved far more success than just a remand to the agency; the project that they had challenged was abandoned.[3] In *Save Our Ecosystems* v. *Clark,* 747

[3]See 776 F.2d at 386 (referring to 'Westway', the once-proposed replacement for a portion of the West Side Highway in lower Manhattan"); see also *New York Leaders Give Up Westway and Seek Trade-in,* N.Y. Times, Sept. 20, 1985, at A1, col. 1.

F.2d 1240 (9th Cir. 1984), *Southern Oregon Citizens Against Toxic Sprays, Inc.* v. *Clark,* 720 F.2d 1475 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984), and *Environmental Defense Fund, Inc.* v. *Watt,* 554 F. Supp. 36 (E.D.N.Y. 1982), aff'd, 722 F.2d 1081 (2d Cir. 1983), the plaintiffs succeeded in bringing about a cessation of the spraying of certain chemicals, and none of the three decisions involved the ordering of a remand to the agency for further proceedings. Nor did any of the three opinions indicate any expectation that spraying would resume following further agency proceedings.[4] And, significantly, in none of the three cases was prevailing-party status a contested issue.

In *Fast* v. *School District,* 728 F.2d 1030 (8th Cir. 1984) (en banc), and *Bagby* v. *Beal,* 606 F.2d 411 (3d Cir. 1979), the plaintiffs prevailed on procedural due process claims and were granted hearings that otherwise would not have been provided to them. Although each plaintiff ultimately failed to overturn the underlying substantive action, the courts held that they were prevailing parties. The continuing authoritativeness of those decisions is questionable, in light of the holding and rationale of this Court's subsequent decision in *Hewitt* v. *Helms, supra.* Those cases are, in any event, distinguishable from typical administrative-law cases involving remands, such as the present one, in which the purpose of the remand is to require the agency to reexamine or provide further justification for its deci-

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[4] Although in some instances the agency eventually did resume spraying after preparing new environmental impact statements that met the courts' concerns, the government apparently did not urge, and there is no reason to believe that the courts considered, any possible argument that the ultimate failure of the plaintiffs to achieve a permanent cessation of the spraying meant that they were not prevailing parties.

sion, and not to vindicate an individual constitutional right of the plaintiff that is " 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions" (*Carey* v. *Piphus*, 435 U.S. 247, 266 (1978)).[5]

Likewise, the decision in *Lear Siegler, Inc., Energy Prods. Div.* v. *Lehman*, 842 F.2d 1102, 1115-1117 (9th Cir. 1988), rests on the proposition that the plaintiff's victory on a major issue concerning the constitutionality of an Act of Congress sufficed to make it a prevailing party, particularly because the plaintiff had "a long-term interest in * * * [government] compliance [with that Act] because it is likely to bid on government contracts in the future" (842 F.2d at 1116). Petitioners' temporary success in challenging the adequacy of one particular record supporting the particular highway project they opposed (which ultimately was approved) sets no such important precedent and vindicates no such long-term interest of petitioners. Finally, in *Guerrero* v. *Marsh*, 819 F.2d 238 (9th Cir. 1987), the court's reasoning is difficult to discern because the court addressed attorneys' fees only in a single conclusional sentence at the end of its opinion. At all events, the case is distinguishable from this case because it did not involve a remand to an agency that remained potentially free to adhere to its original decision; rather, the case involved a grant of a writ of mandamus to compel an agency to exercise jurisdiction over an application (for correction of military records) over which the agency had refused to exercise jurisdiction. The case cannot fairly be read to signal

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[5] Petitioners also cite (Pet. 20) *Institutionalized Juveniles* v. *Secretary of Public Welfare*, 758 F.2d 897, 911 n.25 (3d Cir. 1985), but we cannot discern any way in which that case, in which significant institutional reforms resulted from the litigation at issue, could be said to advance petitioners' position.

a retreat from the established principle in the Ninth Circuit that "securing a remand on an appeal of an administrative * * * decision is insufficient to qualify a claimant as a prevailing party under the EAJA" (*Swenson* v. *Heckler,* 801 F.2d at 1080)—particularly in light of the support that that principle has received from this Court's decision in *Hewitt* v. *Helms, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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